

**IN THE UNITED STATES DISTRICT COURT FOR THE  
EASTERN DISTRICT OF OKLAHOMA**

THE CHEROKEE NATION,

*Plaintiff*

—v—

CVS PHARMACY, INC.; OKLAHOMA  
CVS PHARMACY, L.L.C.; WALGREEN  
CO.; WAL-MART STORES, INC.,

*Defendants.*

Case No. 6:18–CV–56–RAW–SPS

Hon. Ronald A. White

**DEFENDANTS’ MOTION TO STAY DISCOVERY AND REMAINING PRETRIAL  
DEADLINES PENDING THE COURT’S RULING ON MOTION  
FOR JUDGMENT ON THE PLEADINGS AND BRIEF IN SUPPORT**

Pursuant to Federal Rule of Civil Procedure 26, Defendants CVS Pharmacy, Inc., Oklahoma CVS Pharmacy, L.L.C., Walgreen Co., and Walmart Inc. (“Defendants”), respectfully request that the Court stay all discovery pending this Court’s ruling on Defendants’ Motion for Judgment on the Pleadings (Dkt. 469) and stay the remaining pretrial deadlines accordingly.\*

The Oklahoma Supreme Court’s recent landmark decision dismissing Oklahoma’s public nuisance lawsuit over the opioid epidemic has eviscerated the basis of Cherokee Nation’s lawsuit, and accordingly, Defendants have moved for judgment on the pleadings on all of Plaintiff’s claims. *See Oklahoma ex rel. Hunter v. Johnson & Johnson* (“*Johnson & Johnson*”), 2021 WL 5191372, 2021 OK 54 (Okla. Nov. 9, 2021). Even if the Court grants judgment on some of the Cherokee

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\* Some deadlines (*e.g.*, expert reports) are based off the fact discovery deadline, while others, including the summary judgment, Rule 702, and trial-related deadlines are fixed dates that will need to be set by the Court to fall at the appropriate time after fact and expert discovery closes. *See* Dkt. 449. Defendants request that all dates in the Case Management Order be stayed pending resolution of the Motion for Judgment on the Pleadings.

Nation's claims but allows others to proceed, the contours of any remaining claims—and the scope of relevant discovery—will be significantly affected.

Because the case should be dismissed following the *Johnson & Johnson* ruling, or at the very least, the shape of any surviving claims is uncertain and subject to significant change by the Court's ruling on the pending Motion for Judgment on the Pleadings, this Court should stay discovery (and the remaining pretrial deadlines) until it decides that motion.

The parties have conferred in advance of filing this motion as required by LCvR 7.1(f) and Plaintiff opposes the requested relief.

### **BRIEF IN SUPPORT**

Pursuant to Federal Rule of Civil Procedure 26(c), the district court has discretion to stay discovery pending the outcome of a dispositive motion. *Samson Resources Co. v. J. Aron & Co.*, 2009 WL 1606564, \*1 (N.D. Okla. June 8, 2009). Rule 26(c), which governs motions for protective orders, provides that “the court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.” *Id.* A stay of discovery until after resolution of a dispositive motion is appropriate where the dispositive motion, if granted, disposes of the entire case, disposes of issues on which discovery is sought, or where discovery on all issues in a party's broad pleading would be wasteful or burdensome. *See Ciempa v. Jones*, 2012 WL 1565284, \*3 (N.D. Okla. May 2, 2012). The Tenth Circuit has considered five factors in determining whether to stay discovery pending the outcome of a dispositive motion: “(1) plaintiff's interests in proceeding expeditiously with the civil action and the potential prejudice to plaintiff of a delay; (2) the burden on the defendants, (3) the convenience to the court, (4) the interests of persons not parties to the civil litigation, and (5) the public interest.” *In re Broiler Chicken Grower Litigation*, 2017 WL 3841912, \*3 (E.D. Okla. Sept. 1, 2017). Here, these factors support a stay.

Plaintiff will not be prejudiced by a brief stay of discovery pending this Court's ruling on Defendants' Motion for Judgment on the Pleadings. Plaintiff has not sought preliminary relief, and there is no reason to believe that a stay would harm Plaintiff's ability to continue discovery if any claims survive Defendants' motion. The burden on Defendants, however, would be significant. Defendants' motion, if granted, would resolve all of Plaintiff's claims in this action, eliminating any need for further discovery. And even if the Court dismisses only some claims, its ruling will likely alter the shape and focus of discovery on the remaining claims.

As just one example, the parties are discussing Defendants' potential production of a vast array of hard copy and electronic notes associated with prescriptions their pharmacists dispensed. Based on experience in other cases, notes production is a monumental task that takes months to complete. Pharmacists can make electronic comments regarding patients or prescriptions in a number of different locations, so identifying and pulling all comments associated with specific prescriptions requires intensive effort. Moreover, because pharmacists also sometimes make handwritten comments on physical prescriptions, those prescriptions must be gathered from disparate locations and individually reviewed. Finally, because both electronic and physical notes often contain highly-sensitive protected health information, they must be manually reviewed and redacted, taking several more months at least. The extent and nature of any potential notes production will depend on the ultimate claims (if any) that survive the pending motion.

These labors will be entirely wasted if this Court grants Defendant's Motion for Judgment on the Pleadings. And even if some of Cherokee Nation's claims survive, the scope of discovery will likely change significantly based on the Court's decision. As just one example, if the Court holds (as it should) that Oklahoma's "learned intermediary doctrine" applies to any remaining negligence claim, then Cherokee Nation must prove that Defendants dispensed prescriptions that

were “facial[ly]” “unreasonable” because they “prescribe[d] facially bizarre quantities or dosages clearly outside of any acceptable range, or clearly inappropriate drugs.” *Carista v. Valuck*, 2016 OK CIV APP 66, ¶¶ 6-7, 394 P.3d 253, 256-57 (Okla. Civ. App. 2016). Cherokee Nation, however, demands that Defendants produce all notes associated with all prescriptions for a large number of patients of its own choosing, irrespective of whether any such prescription caused Cherokee Nation specific harm or was “unreasonable on its face.” Dkt. 443 at 5. Defendants should not have to undertake further costly discovery until this Court has resolved which claims, if any, survive Defendants’ dispositive motion, and in what form.

Granting a temporary stay would further the interests of the Court, non-parties, and the public in the efficient use of judicial resources. *See In re Broiler Chicken Grower Litigation*, 2017 WL 3841912, at \*5. If a stay of discovery is not granted, the Court is likely to become entangled in a number of discovery disputes between the parties and third parties that turn on global issues about the contours of the case. As for third parties, Defendants have served more than 50 third-party subpoenas, and there are ongoing disputes over these subpoenas that must be resolved. These discovery disputes, like those between the parties, would be eliminated if the Court granted Defendants’ pending motion in full. And even if the motion is granted only in part, again, the Court’s ruling would likely transform this case, including the scope and focus of discovery (and the disputes that discovery generates). Staying discovery thus serves this Court’s, third parties’, and the public’s interest.

Defendants have thus met their burden to show that a limited, temporary stay is warranted until resolution of their pending dispositive motion. Plaintiff will not be prejudiced if this Court grants a stay of discovery to consider and rule on Defendants’ Motion for Judgment on the

Pleadings. On the other hand, this Court and Defendants would be unduly burdened and subject to unnecessary expense if a stay is not entered and discovery proceeds.

WHEREFORE, for the reasons discussed above, Defendants respectfully request that the Court grant this motion and enter an order staying discovery in this action (and the remaining pretrial deadlines) until this Court enters its ruling on Defendants' pending Motion for Judgment on the Pleadings.

Date: December 18, 2021

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 18<sup>th</sup> day of December, 2021, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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